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WESTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOEL HODGELL and ED KONEK,

Plaintiffs,

v.

SAMSON DISTRIBUTING, INC., SDI,
LEGALSTEROIDS.COM and SDI-
LABS.COM,

Defendants.

No. C02-2184Z

ORDER

This matter comes before the Court on plaintiffs' Hodgell and Konek's motion for injunctive relief and sanctions, docket no. 15.

I. BACKGROUND

This case arises out of plaintiffs' allegations pursuant to R.C.W. 19.190 (Commercial Electronic Mail Act); R.C.W. 19.86 (Washington Consumer Protection Act); and common law torts of trespass to chattels, harassment, and theft of services (R.C.W. 4.04.010). On December 17, 2002, plaintiffs moved for injunctive relief and sanctions. See Plaintiffs' Motion for Injunctive Relief and Sanctions, docket no. 15. On December 27, 2002, this Court granted Defendant's Motion for an Enlargement of Time on Plaintiffs' Motion for Injunctive Relief and Sanctions. On December 30, 2002, this Court denied Defendant's

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1 Motion to Dismiss for Lack of Personal Jurisdiction. See Minute Order, docket no. 23. The
2 Plaintiffs' Motion for Injunctive Relief and Sanctions is now before the Court.

3 **A. The Plaintiffs**

4 Plaintiff Joel Hodgell is a Washington resident. Hodgell claims that the defendants
5 have sent 61 spams to his various emails addresses by using the third-party Internet domains
6 of "hotmail.com" and "msn.com." See Hodgell Decl., docket no. 17, at 3. In addition,
7 Hodgell claims that Dan Amato, President of defendant SDI, wrote him a threatening email
8 on October 3, 2001. Id. at 2, and at Ex. B. In November 2001, Hodgell notified defendants
9 of the ongoing spam, asked them to cease and desist, and provided some of his email
10 addresses to defendants. Id. at 2, and at Ex. C. Hodgell claims that he has repeatedly replied
11 to the "from" email addresses used by defendants in their spams. Id. at 2. The spams
12 promote defendant Samson's website that sells nutritional supplements. See Id. at Ex. D.
13 Hodgell claims he received 37 of the spams from defendants after they were told to cease and
14 desist. Id. at 6. In his January 16, 2003 declaration, Hodgell claims that he had received a
15 total of 64 spams from defendants, including 2 spams after he filed his motion for injunctive
16 relief. See Hodgell Decl., docket no. 27, at 2.

17 Plaintiff Ed Konek is a Washington resident. In his December 17, 2002 declaration,
18 Konek claimed that the defendants had sent him 6 spams since receiving his email addresses
19 in discovery. See Konek Decl., docket no. 16, at 2. In January 2002, Konek contacted
20 defendant SDI-Labs by telephone and spoke with a person who identified himself as Dan
21 Amato, and requested to be removed from his email database. Id. at 1-2. Konek has also
22 repeatedly contacted the defendants by replying to the "from" email addresses used by
23 defendants in their spams, to explain that he is a Washington resident, and that they are
24 violating Washington laws R.C.W. 19.190 (the Commercial Electronic Mail Act) and R.C.W.
25 19.86 (the Consumer Protection Act). Id. at 2. In his January 16, 2003 declaration, Konek
26 claimed that he had received over 41 spams from the defendants since January 2002. See

1 Konek Decl., docket no. 28, at 2. Konek received the most recent spam advertising
2 defendant SDI's "legal" steroids on January 13, 2003. Id. at 3

3 **B. The Defendants**

4 Defendant Samson Distributing, Inc. (SDI) is a Florida corporation with its principal
5 place of business in Lake Worth, Florida. See Amato Decl., docket no. 25, at 1. Amato is
6 President and owner of SDI. Id. Defendants SDI Legalsteroids.com, and SDI-Labs.com are
7 domain names owned by SDI, and the defendants may be collectively referred to as
8 "Samson." See Defendant's Opposition to Plaintiffs' Motion for Injunctive Relief and
9 Sanctions, docket no. 24, at 1. Samson is in the business of providing nutritional
10 supplements. See Amato Decl., docket no. 25, at 1.

11 Samson promotes and sells its products via mass email advertisements. Id. at 2.
12 Samson claims that its emails comply with applicable laws, "including that (1) the subject
13 line of the E-mail is not misleading, (2) the point of origin or transmission path of an E-mail
14 is not misrepresented or obscured, and (3) replying to the from address is sent to valid email
15 accounts." Id. at 2. Samson claims that it honors all 'unsubscribe' requests, and that the
16 recipient need only send an email with the word "remove" in the subject. Id. at 3.

17 **II. DISCUSSION**

18 Plaintiffs seek the provisional remedies of injunctive relief and sanctions before a full
19 resolution of the parties' claims. While state law applies to substantive issues in a diversity
20 action, federal law governs standards to issuing a preliminary injunction. Instant Air Freight
21 Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989). Even when causes of action
22 are state-created, Fed. R. Civ. P. 65(a) contemplates a "federal standard as governing
23 requests addressed to federal courts for preliminary injunctions." Id. at 799 (quoting Systems
24 Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977)). A
25 preliminary injunction is a provisional remedy that is only issued in extraordinary
26 circumstances, and the moving party bears the burden of establishing that the circumstances

1 justify a preliminary injunction. Granny Goose Goods Inc. v. Teamsters, 415 U.S. 423, 441
2 (1974).

3 **A. Plaintiffs Fail to Satisfy the Federal Requirements for a Preliminary Injunction**

4 In the Ninth Circuit, preliminary injunctive relief is only available to a moving party
5 who demonstrates either (1) a combination of the possibility of irreparable harm and
6 probable success on the merits, or (2) that serious questions are raised and the balance of
7 hardships tips in the movant's favor. Sammartano v. First Judicial District Court, 303 F.3d
8 959, 965 (9th Cir. 2002). Plaintiffs fail to establish either the possibility of irreparable harm
9 in the absence of a preliminary injunction, or probable success on the merits. In addition,
10 plaintiffs fail to establish that the balance of hardships tips in the movants' favor for a
11 preliminary injunction.

12 **1. Irreparable Harm**

13 Plaintiffs fail to demonstrate that they would suffer irreparable harm if the requested
14 preliminary injunction were not granted. Irreparable harm is reserved for serious harms
15 where monetary damages are insufficient, such as where failure to issue injunctive relief
16 would result in an inability to exercise free speech or other Constitutional rights. See e.g.,
17 Sammartano, 303 F.3d at 965. Plaintiffs' allegations that defendants' emails annoy and
18 harass them falls short of demonstrating irreparable harm. See Denovellis v. Shalala, 135
19 F.3d 58, 63-64 (1st Cir. 1998) (finding that mere psychological stress does not constitute
20 irreparable harm warranting injunctive relief).

21 **2. Likelihood of Success on the Merits**

22 Plaintiffs have not demonstrated a likelihood of success on the merits, either with
23 respect to plaintiffs' claim under R.C.W. 19.190 (the Washington Commercial Electronic
24 Mail Act) or under R.C.W. 10.14 (the Washington Anti-Harassment Statute).

25 R.C.W. 19.190 only prohibits the transmission of certain types of unsolicited
26 commercial email. Violation of R.C.W. 19.190 requires that:(1) the sender know or have

1 reason to know that the recipient is a Washington resident, and (2) the email must contain
2 false or misleading information in the subject line, the sender must use a third party's domain
3 name without permission, or the sender must misrepresent information in identifying the
4 point of origin or transmission path of a commercial email message. See R.C.W. 19.190.020.
5 Defendant Samson claims its emails comply with these requirements of R.C.W. 19.190.020.
6 See Amato Decl., docket no. 25, at 2; see also Defendants' Opposition to Plaintiffs' Motion
7 for Injunctive Relief and Sanctions, docket no. 24, at 8-9. Consequently, plaintiffs have not
8 established a likelihood of success on the merits with respect to R.C.W. 19.190.

9 Plaintiffs have also not demonstrated a likelihood of success on the merits under
10 R.C.W. 10.14. First of all, Fed. R. Civ. P. 8 requires that a pleading set forth a claim for
11 relief, including a short and plain statement of the grounds upon which the court's
12 jurisdiction depends. Plaintiffs' request for injunctive relief and sanctions under R.C.W.
13 10.14 is inappropriate relief to request by motion. Plaintiff's initial complaint has already
14 requested that the Court issue a permanent injunction enjoining and restraining defendants
15 from continuing or engaging in the "unlawful conduct" alleged in the Complaint. See Notice
16 of Removal, docket no. 1 (Complaint for Damages and Relief Under the Unfair Business
17 Practices—Consumer Protection Act and the Unsolicited Electronic Mail Act, at ¶ 7.6).
18 However, plaintiffs did not request relief under R.C.W. 10.14 in the initial complaint, and did
19 not amend their pleadings.

20 In addition, plaintiffs failed to comply with the personal service requirements of
21 R.C.W. 10.14.070. Although R.C.W. 10.14.070 allows the court to issue an ex parte order
22 for protection, the court only has personal jurisdiction absent personal service for such ex
23 parte orders if the petitioners "show reasonable proof of unlawful harassment" and that
24 "great or irreparable harm will result to the petitioner if the temporary anti-harassment
25 protection order is not granted." See R.C.W. 10.14.080(1). As discussed above, plaintiffs
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1 have not established that “great or irreparable harm” will result, so plaintiffs must comply
2 with the personal service requirements of R.C.W. 10.14.

3 Even if R.C.W. 10.14 was pled in the original complaint or an amended complaint,
4 and even if plaintiffs met its personal service requirements, plaintiffs fail to demonstrate a
5 likelihood of success on the merits under R.C.W. 10.14. The legislature adopted R.C.W.
6 10.14 because it found that “serious, personal harassment through repeated invasions of a
7 person’s privacy by acts and words showing a pattern of harassment designed to coerce,
8 intimidate, or humiliate the victim is increasing.” R.C.W. 10.14.010. Further, R.C.W.
9 10.14.020 requires “unlawful harassment” to “actually cause substantial emotional distress to
10 the petitioner.” The elements of a cause of action for “unlawful harassment” are (1) a
11 knowing and willful (2) course of conduct (3) directed at a specific person (4) which
12 seriously alarms, annoys, or harasses such person, and (5) serves no legitimate or lawful
13 purpose. R.C.W. 10.14.020(1); see also Burchell v. Thibault, 874 P.2d 196 (1994).

14 Plaintiffs fail to establish the level of “irreparable harm” required by federal law for
15 preliminary injunctions. Plaintiffs also fail to establish the level of harm required to obtain
16 relief under R.C.W. 10.14. To obtain a protection order under R.C.W. 10.14, a plaintiff must
17 show that the conduct would “cause a reasonable person to suffer substantial emotional
18 distress...[and must] actually cause substantial emotional distress.” Burchell v. Thibault, 74
19 Wash. App. 517, 522 (1994). Washington courts have applied the anti-harassment statute to
20 emotionally charged situations, such as those involving physical threats and assaults (see
21 e.g., Burchell, 74 Wash. App. at 522) and repeated violations of civil rights based on
22 malicious racial motivation (see e.g. Nafziger v. Nafziger, 69 Wash. App. 906, 910 (1993)).
23 However, plaintiffs cite no authority for applying R.C.W. 10.14 to merely annoying receipt
24 of unsolicited emails. Therefore, plaintiffs fail to show the required level of harm to obtain
25 relief under R.C.W. 10.14.

1 **B. Plaintiffs' Request for Monetary Sanctions**

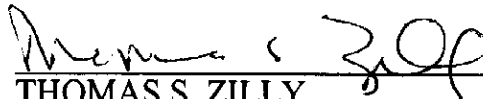
2 The plaintiffs also request an award of sanctions in the amount of \$500 for each
3 harassing email sent since July 2001. See Plaintiff's Motion for Injunctive Relief and
4 Sanctions, docket no. 15, at 1, 8. R.C.W. 10.14 does not provide sanctions, other than for
5 filing fees, court costs, and costs incurred in bringing the action. See R.C.W. 10.14.090(2).
6 In addition, R.C.W. 10.14 "is not intended to provide redress for past injury. The purpose of
7 the legislation is to facilitate the issuance of 'protection orders *preventing all further*
8 unwanted contact between the victim and the perpetrator.' " Burchell v. Thibault, 74 Wash.
9 App. 517, 522 (quoting R.C.W. 10.14.010) (emphasis in original). Thus monetary sanctions
10 for past harassment is not provided by the statute, and does not comport with the purpose of
11 the statute. Therefore the requested award of monetary sanctions under R.C.W. 10.14 for
12 each harassing email is unavailable.

13 **III. CONCLUSION**

14 For the foregoing reasons, the court DENIES plaintiffs' motion for injunctive relief
15 and sanctions, docket no. 15.

16 IT IS SO ORDERED.

17 DATED this 20th day of February, 2003.

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20 THOMAS S. ZILLY
21 UNITED STATES DISTRICT JUDGE
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